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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1340

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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February 11, 1971

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No.

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION, *et al.*,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners Professional Air Traffic Controllers Organization ("PATCO"), its officers, agents, servants, members, George DiLeo, John Leyden, Robert C. Sturgill, John Maher, Stanley Gordon, Edward Williams, Norris Skaggs, Ronald Zeitler, Fred Seufert, and Alan Isacowitz respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 10, 1970.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at p. 1a. The opinion of the District Court for the Eastern District of New York is reported at 313 F. Supp. 181, and at p. 34a of Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on December 10, 1970 and this petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Questions Presented

1. Whether a United States District Court has the power to restrain *pro tempore* disciplinary action as a condition to the grant of a preliminary injunction sought by a federal executive administrative agency against certain of its employees for an alleged violation of 5 U.S.C. §7311.

2. Whether the District Court abused its discretion in directing the Federal Aviation Administration to withhold disciplinary action against certain of its employees pending a judicial determination on the merits as to whether a work stoppage in violation of 5 U.S.C. §7311 had in fact occurred.

Statutory Provisions Involved

United States Code, Title 28:

§1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

United States Code, Title 5:

§7311. Loyalty and striking

An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia.

Statement of the Case

On March 25, 1970 approximately 3,100 journeymen air traffic controllers throughout the United States employed by the Federal Aviation Administration (hereinafter referred to as FAA) reported to their superiors that they were too sick and fatigued to control the nation's air traffic in safety. Acting on behalf of FAA, the United States of America moved in eighteen jurisdictions across the nation to enjoin the controllers from continuing what was termed an illegal work stoppage. Jurisdiction in the District Courts was alleged by the Government to be based on 28 U.S.C. §1331 (federal question); 28 U.S.C. §1345 (United States as plaintiff); and 5 U.S.C. §7311 (loyalty and striking).

The complaints uniformly alleged that the individual defendant controllers, along with the Professional Air Traffic Controllers Organization (hereinafter referred to as PATCO) were engaged in a strike against the air traffic control system operated by FAA resulting in immediate and irreparable damage to the United States of America and its citizens.

In all jurisdictions the FAA sought and received a temporary restraining order which, *inter alia,* prohibited PATCO and the individual defendants from engaging in, continuing, or otherwise encouraging the strike; directed the individual defendants to return to work; and directed both the individual defendants and PATCO to take such steps as were necessary to have other members of PATCO resume their normal employment duties.

In the instant case, the United States made an application to the District Court for the Eastern District of New York for an injunction against PATCO, it officers, agents, servants, members and the named defendants, the majority of whom were officials of the New York Chapter of the controllers' organization. A protracted hearing ensued and at the close of the Government's case, petitioner's counsel consented to a twenty-one day preliminary injunction.

Immediately thereafter FAA transferred all of the individual petitioners to administrative duties at installations other than those previously assigned and further caused to be issued approximately seven notices of proposed removal and three hundred thirty-three notices of proposed suspension to the petitioners and other air traffic controllers who were subject to the preliminary injunction.

On May 5, 1970 the District Court modified its preliminary injunction to direct the FAA to restore all defendants to the performance of their duties and to withhold any further administrative actions against any employees subject to the Court's injunction. In particular, paragraph III of the Order of May 5th provides:

> "That the Federal Aviation Administration be and it hereby is directed until further order of this Court:
>
> (a) To restore all defendants in the action who have returned to work to the performance of the duties to which they were assigned prior to March 25, 1970, not later than May 18, 1970.
>
> (b) To withhold any further administrative actions in respect of suspensions, removals or any other sanctions based upon the alleged work stoppage between March

25, 1970 and April 14, 1970, against any employees who are defendants in these actions and subject to the temporary injunction issued by this Court." See pp. 67a-68a of the Appendix hereto.

The United States appealed paragraph III of the injunction and the Court of Appeals vacated that portion of the District Court's order. In so doing the Second Circuit held that the FAA had the power to discipline its employees without judicial interference and that the District Court's action in attempting to preserve the *status quo* pending a final determination of the dispute was not authorized by 28 U.S.C. §1651.

REASONS FOR GRANTING THE WRIT

1.

The decision below conflicts with the decisions of other Courts of Appeals as to the power of the District Court to impose conditions on a grant of a preliminary injunction.

Section 1651 of Title 28 provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The Second Circuit Court of Appeals here held that Section 1651 did not authorize the District Court to enjoin the FAA from taking any disciplinary action against air traffic controllers who allegedly participated in a work stoppage. The Court held that the FAA has the power to discipline its employees without judicial interference and an injunction against such executive action was not necessary

to protect the Court's jurisdiction over the action before it nor to preserve the *status quo* pending a final determination of the dispute.

In so holding, the Second Circuit conceded that its interpretation of the District Court's action conflicts with the rationale adopted by two other circuits in affirming substantially similar actions taken by District Courts. *United States of America* v. *Moore,* 427 F.2d 1020 (10th Cir. 1970); *United States of America* v. *Plasch* (7th Cir., July 10, 1970). See p. 31a of the Appendix hereto.

In both the Tenth and Seventh Circuits, the courts addressed themselves to District Court orders which temporarily protected air traffic controllers from sanctions sought to be imposed by the FAA and arising out of the identical fact pattern present in the case at bar. The Tenth Circuit considered the matter as a review of a trial court order (as opposed to the review of an order of an administrative agency) and held that "the federal courts have power to issue such writs and orders as are necessary to protect their jurisdiction." *United States* v. *Moore, supra,* at p. 1023 (App. 21a).

Citing 28 U.S.C. §1651, the Tenth Circuit noted that the purpose of the lower court's order was limited to a preservation of the *status quo* existing prior to March 25, 1970 until the final determination of the action seeking a permanent injunction and was supported by precedent in the case of *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R. Co., Inc.,* 363 U.S. 528. In upholding the power of the District Court to enter the order, the Tenth Circuit found that the lower court had not abused its discretion in so conditioning the preliminary injunction. *United States* v. *Moore, supra.*

The Seventh Circuit referred to the opinion of the Tenth Circuit and adapted its rationale also on the authority of 28 U.S.C. §1651 and the authority of *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R. Co., Inc., supra.* The Seventh Circuit held that the imposition of such conditions by the District Court was not an abuse of discretion in protecting its duty to make a final decision in the case in an atmosphere of calm and orderly judicial determination. See p. 33a of the Appendix hereto.

Judge Waterman, of the Second Circuit, dissenting in the instant case below, distinguished the instant case from those where the court was being asked to review what the Government had done in the past with regard to disciplinary actions on the ground that the instant case arose from the Government's challenge to present action taken by its employees and a Government request for affirmative present equitable relief. He reasoned that, in the case at bar, the Government initiated the suit and it was the Government that asked for equitable relief. Citing *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R. Co.,* 363 U.S. 531-532 (1960) the dissent concluded that having sought equity the Government could be compelled to do equity. Lastly, the dissent pointed out that the District Court had the power temporarily to enjoin the Government in exercising its disciplinary function where such disciplinary procedures were being challenged as unconstitutional in a connected case [*Leyden* v. *Federal Aviation Administration and George M. Gary,* 315 F. Supp. 1398 (E.D.N.Y. 1970)], then pending before the same Judge. See pp. 7a-15a.

This conflict between the circuits with regard to the power of the District Court to condition its orders for affirmative

relief justifies the grant of certiorari to review the judgment below.

2.

The decision below fails to establish meaningful guidelines for District Courts dealing with injunctions sought by executive administrative agencies in labor disputes.

In iceberg fashion the question now before this Court is but a fragment of the festering problem with which District Courts are now grappling in the field of federal labor-management relations.

While U.S. Department of Labor statistics indicate that as of June 30, 1970 the number of federal civilian employees within the continental United States numbered 2,710,158, it has been estimated that by 1980 this number will exceed 3,000,000. In the past year alone at least three federal labor disputes (post office employees, federal printing office, and air traffic controllers) have caused the executive branch to resort to the federal judiciary to solve their problems.

A typical example is the instant case where the Government moved for injunctive relief against air traffic controllers simultaneously in eighteen jurisdictions across the nation.[1]

That the judiciary in the main responded with alacrity and understanding is typified by conditional orders initiated

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[1] Alaska, California (Eastern, Central and Northern Districts), Colorado, Hawaii, Illinois (Northern District), Kansas, Minnesota, Nevada, New Jersey, New York (Eastern District), Ohio (Northern District), Pennsylvania (Western District), Texas (Northern District), Utah, Virginia (Eastern District) and the District of Columbia.

not only in the Eastern District of New York, but in Chicago (N.D. Ill.), Cleveland (D.C. Ohio), Denver (D.C. Colorado), Pittsburgh (W.D. Pa.), and New Jersey, which imposed restraints on executive action.

However, the guidelines by which and the extent to which the executive branch must submit to the judicial branch where the executive acts as plaintiff in cases such as these has not been clearly defined. What rights and obligations does the executive branch assume when it submits a controversy as a plaintiff to the judicial branch? May the executive obtain enforcement remedies? Was Judge Waterman correct when he stated in dissent that "it [was] not the act of a responsible government agency broadly to seek court intervention by injunction, obtain it, and then, hiding behind the inherent equity powers of the Court, seek, by executive action, to nullify unfairly the *status quo* the Court created at the agency's request." (App. p. 11a)

The present decision of the Court of Appeals for the Second Circuit leaves no room for district courts to effectively address themselves to the solution of contemporary, complicated and at times frustrating federal labor disputes. There is an imperative need for explicit guides so that district courts may effectively shape their enforcement power in dealing with this growing problem.

Moreover, the District Court below and both the Tenth and Seventh Circuits have stated that it is within their power both under 28 U.S.C. §1651 and under their inherent general equity powers to condition the relief granted the executive branch of Government in light of the facts of the case before the Court. Judge Judd, in the District Court, pointed up the importance of this issue when he

stated, "[i]f I thought they were not going to be put to work I would have hesitated before ordering them back."

It is clear that the issue sought to be reviewed does not relate to judicial review of administrative agency disciplinary actions of its employees, but rather that of the interplay between the judicial and executive branches of the Government while controversies involving them are before the courts.

In the light of a marked increase in labor unrest among public employees and in view of Judge Waterman's concern with the apparently unrealistic and troublesome provisions of 5 U.S.C. §7311 heretofore sought to be applied in such disputes, it is clear that District Courts must have guidelines by which decisions in this area can equitably and effectively be made and enforced.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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Opinion of the United States Court of Appeals in
United States v. Professional Air Traffic Controllers
Organization, et al.

Opinion of the United States Court of Appeals in *United States* v. *Professional Air Traffic Control Organization, et al.*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 916—September Term, 1969.

(Argued July 15, 1970 Decided December 10, 1970.)

Docket No. 34968

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

—v.—

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION ("PATCO"), its officers, agents, servants, members, *et al.*,

Defendants-Appellees.

Before:

WATERMAN, MOORE and HAYS,

Circuit Judges.

Appeal from so much of a preliminary injunction issued by the United States District Court for the Eastern District of New York, Orrin G. Judd, *Judge*, as enjoined the Federal Aviation Administration from instituting disciplinary action against certain employees who are members of PATCO.

Injunction vacated in part.

WILLIAM D. RUCKELSHAUS, Assistant Attorney General, Washington, D. C. (Carl Eardley, Deputy Assistant Attorney General, Washington, D. C., Edward R. Neaher, United States Attorney, Brooklyn, N. Y., Alan S. Rosenthal and Robert E. Kopp, Attorneys, Department of Justice, Washington, D. C., on the brief), *for Plaintiff-Appellant in No. 34968.*

JAMES M. CATTERSON, JR., Port Jefferson, N. Y. (Catterson and Nolan, Port Jefferson, N. Y., on the brief), *for Defendants-Appellees in No. 34968.*

MURRAY GARTNER, New York, N. Y. (Herbert Prashker, A. Thomas Hunt, Poletti, Freidin, Prashker, Feldman and Gartner, New York, N. Y., on the brief), *for Plaintiffs-Appellants in No. 35072.*

NICHOLAS SCOPPETTA, New York, N. Y. (Marvin B. Segal, Segal and Hundley, New York, N. Y.), *for Defendants-Appellees in No. 35072.*

HAYS, *Circuit Judge*:

I.

On March 25, 1970, commencing at 8:00 a.m., large numbers of air traffic controllers, employees of the Federal Aviation Administration (FAA), absented themselves from their work. The air traffic controllers reported that they were ill or gave other reasons for their absences. A number of applications were made to the federal courts for in-

junctions against the employees. The present appeal arises out of such an application by the United States in the United States District Court for the Eastern District of New York against the Professional Air Traffic Controllers Organization (PATCO), its officials and several hundred aircraft controllers. The district court issued a preliminary injunction which enjoined the air traffic controllers from "in any manner continuing, encouraging, ordering, engaging, aiding or taking any part in any strike, work stoppage or slowdown or any interference with or obstruction to the movement or operation of any aircraft. . . . "

Paragraph III of the injunction provides:

> "That the Federal Aviation Administration be and it hereby is directed until further order of this court:
>
> (a) To restore all defendants in the action who have returned to work to the performance of the duties to which they were assigned prior to March 25, 1970, not later than May 18, 1970.
>
> (b) To withhold any further administrative actions in respect of suspensions, removals or any other sanctions based upon the alleged work stoppage between March 25, 1970 and April 14, 1970, against any employees who are defendants in these actions and subject to the temporary injunction issued by this court."

The United States appeals paragraph III of the injunction barring the FAA from taking any disciplinary action against the aircraft controllers who participated in the work stoppage.

We have jurisdiction to hear this appeal under 28 U.S.C. §1292(a)(1) (1964).

We conclude that the order contained in paragraph III of the injunction must be vacated.

II.

The FAA has the power to discipline its employees without judicial interference. In *McTiernan* v. *Gronouski,* 337 F.2d 31, 34 (2d Cir. 1964), this court noted the "limited permissible scope of judicial review in this area" and said:

> "The taking of disciplinary action against government employees, including the invocation of the sanction of dismissal, is a matter of executive discretion, and is subject to judicial supervision only to the extent required to insure 'substantial compliance with the pertinent statutory procedures provided by Congress,' . . . and to guard against arbitrary or capricious action. . . . "

The FAA is directed by statute to perform a specific task, requiring administrative expertise, in a manner consistent with the public interest. 49 U.S.C. §1348 (1964). It is for the FAA, not the courts, to gauge the need for and the effect of disciplinary action when an unlawful work stoppage occurs.

> "It is not the business of courts to substitute their untutored judgment for the expert knowledge of those who are given authority to implement the general directives of Congress." *Air Lines Pilots Assoc.* v. *Quesada,* 276 F.2d 892, 898 (2d Cir. 1960).

No proper ground is suggested for holding that the action of the FAA in disciplining its employees could be considered arbitrary or capricious. Discipline based upon the finding that the employees' work stoppage was unlawful is clearly within the power of the administrative agency. If the agency's action in any individual case should prove

to be arbitrary or capricious it would be subject to administrative and eventually judicial review. See *Norton* v. *Macy,* 417 F.2d 1161 (D.C. Cir. 1969).

Appellees' argument that the court was justified in prohibiting the FAA from disciplining its employees because of the possibility that the controllers were entitled to various procedural protections which do not presently exist in FAA regulations is wide of the mark. The FAA's procedures for discipline of its employees have nothing to do with the question that was before the court—whether the controllers were engaged in an illegal work stoppage and if so, whether they should be enjoined from acting in concert to continue that stoppage. Moreover, the nature of the prohibition against the FAA demonstrates that the trial court was not concerned with the general issue of procedural fairness.[1] The order protects only participants in the work stoppage. All other employees (including participants in the work stoppage charged with independent violations) are subject to disciplinary action. If the issue of procedural fairness were properly before the court its order would have halted all FAA discipline of employees. Or the trial court could have simply required that the procedural protections be afforded to all disciplined employees.

III.

Appellees further contend that paragraph III of the injunction is necessary to protect the court's jurisdiction over the action before it, citing 28 U.S.C. §1651 (1964), and to preserve the "status quo" pending a final deter-

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1 These issues are pending before the same district court judge in *Leyden* v. *FAA* (69-C-1566), a suit which was commenced prior to the instant controversy.

mination of the dispute. Although two of our sister circuits have been persuaded by this rationale in affirming substantially similar actions taken by district courts, *United States of America* v. *Plasch,* —— F.2d —— (7th Cir. July 10, 1970); *United States of America* v. *Moore,* —— F.2d —— (10th Cir. June 8, 1970) (but see dissenting opinion of Breitenstein, *C.J.*); we respectfully decline to follow their lead.

No action taken by the FAA against any of the individual defendants in this case would have a detrimental effect on the court's jurisdiction. See 6 Moore's Federal Practice, ¶54.10[5] (1966 ed.). The court will continue to have subject matter jurisdiction and will retain personal jurisdiction over the defendants. Disciplinary action by the agency will not impair the ability of the court to make a proper decision as to whether a permanent injunction should be granted, if called upon to do so.

Section 1651 cannot be used to allow a court to deal "with a matter lying wholly outside the issues in the suit." *DeBeers Mines Ltd.* v. *United States,* 325 U.S. 212, 220 (1945).

5 U.S.C. §7311 (Supp. V. 1965-69) provides in pertinent part:

> "An individual may not accept or hold a position in the Government of the United States . . . if he—
>
> * * * * *
>
> (3) participates in a strike, or asserts the right to strike, against the Government of the United States . . . ."[2]

---

2 18 U.S.C. §1918 (Supp. V. 1965-69) makes criminal any violation of 5 U.S.C. §7311 (Supp. V. 1965-69) and provides sanctions of up to a year and a day's imprisonment, and a fine of up to $1000.

The trial court determined that the government had proven a prima facie case of an illegal work stoppage. In spite of the statute it enjoined the FAA from taking *any* disciplinary action against the defendants based upon the work stoppage.[3] Paragraph III obviously flies in the face of the statute. It must be vacated.

WATERMAN, *Circuit Judge,* dissenting:

I respectfully dissent.

As noted by my brothers, prior to the commencement of the two actions before us on this appeal, the first on March 30, 1970 and the second on April 1, 1970, an air traffic controller, one John F. Leyden, commenced a class action on December 10, 1969 in the Eastern District of New York on behalf of himself and all other similarly situated air traffic controllers employed by the FAA in the Eastern Region against the FAA and its Eastern Regional Director.[1] Leyden sought, *inter alia,* a preliminary injunction enjoining the Eastern Regional Director from acting as an appeals official in connection with suspensions[2] of the

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3 The FAA intends to dismiss only a small number of controllers who were leaders in the strike and to suspend or otherwise discipline certain others. It has been argued that since the statute appears to speak in absolute terms (a striker "may not . . . hold" a government position) and the FAA does not intend to follow these absolute terms, the restraint against the agency is somehow justified. There is a substantial question whether this statute must be read in a manner which would require the government to dismiss all controllers and thereby end air travel service until replacements could be trained. But even if the statute were to be construed in such a manner, it seems obvious that an order prohibiting the discharge of *any* of the offending employees would be unlawful.

1 *Leyden* v. *Federal Aviation Administration and George M. Gary,* 69-C-1566.

2 The suspensions in question were administered for "abuse of sick leave" on June 19, 1969, when numerous FAA employees throughout the country failed to report for work and claimed that they were ill and unable to work.

plaintiffs and enjoining the FAA from holding any hearing or inquiry regarding plaintiffs' appeals from disciplinary action unless seven specific procedural safeguards were afforded the plaintiffs. In that action, after the submission of affidavits, Judge Judd issued a preliminary injunction on August 5, 1970, restraining the Eastern Regional Director from acting as an appeals official in any disciplinary action involving any of the plaintiffs and restraining the FAA from interfering with the right of plaintiffs to record and transcribe proceedings before grievance examiners.[3] On September 11, 1970, the Government answered Leyden's complaint, and on September 30 it filed a notice of appeal from the August 5, 1970 injunction order.

My brothers' essential mistake is in failing to realize that the preliminary injunctions in the present actions, which they would in part vacate, were molded, and properly so, in the light of the issues in the *Leyden* case which was then, and is now, pending before the same judge. The majority's contention that the "FAA's procedures for discipline of its employees have nothing to do with the question that was before the court . . . " is, I submit, incorrect. Judge Judd was primarily concerned, as one would think the Government would also be primarily concerned, in achieving "some degree of labor peace" in order to restore normalcy to the nation's airline traffic. The court found that, after the air controllers had returned to work following the entry of a temporary restraining order which the Government had sought and had obtained, the FAA was not treating the air controllers fairly. Judge Judd stated, 313 F. Supp. 181, 187:

> The court hoped that continuing administrative review by the government might bring some result short

3 315 F. Supp. 1398 (EDNY 1970).

> of amnesty that would satisfy the defendants that they were being fairly treated. It seemed clear to the court that there could be no mediation or amnesty while the men were away from work, but that the possibility existed of some meaningful negotiations after they returned to work. In order to avoid any risk of a new stoppage at the end of the injunction period, the court a few days later submitted a proposal to the parties for indefinite extension of the injunction.
>
> By the time comments were received on this problem, it appeared there was no change of administration policy which was calculated to take account of any mitigating circumstances in connection with the work stoppage, and there was evidence that transfers of duty were being used in a punitive way and that the limited nature of review of any disciplinary action gave the defendants the idea that they would not be fairly dealt with in the administrative procedure.

The court also found that the air controllers' complaints with working conditions were not de minimus, 313 F. Supp. at 187:

> The Court considers also that a substantial number of relatively highly paid men with specialized skills would not violate the law unless there was some provocation that they thought justified it, even though their belief in the justification might be erroneous.
>
> There has been a reduction of compulsory overtime since the work stoppage, which did not come until after the work stoppage, and which suggests that the F.A.A. may, as alleged, have been unduly slow in relieving the pressure on the Controllers.

> I think I said before, and I say now, that those who knowingly disobey a law must face the penalty for the violation. They have no right to amnesty. Nevertheless, they are entitled to fair treatment in the administration of penalties, to consideration of mitigating circumstances, and to a procedure that is such, as far as the Court can assure, as to make the defendants think it is fair.

Judge Judd listed some of the allegedly burdensome working conditions and quoted statistics which indicated that air controllers as a class suffered an abnormally high incidence of various physical disorders allegedly resulting from the pressure of their work. He concluded, 313 F. Supp. at 188:

> The nature of the re-assignment of the men who returned to work and the nature of the notices to the public about the plans for disciplinary action and the nature of the notice of proposed disciplinary procedure do not indicate to me that the F.A.A. is considering the mitigating circumstances which are reflected by these charges.
>
> • • • • •
>
> *It seems to me rather incongruous in this case for the government to ask the court to compel the defendants to return to work and then immediately transfer them to different jobs and serve notice of intention to discharge.* I said on April 13th that if the United States of America seeks equity, it can be compelled to do equity. The complaint in the government action asks that the men be directed to resume their normal employment. If I thought they were not going to be

> put to work I would have hesitated before ordering them back. (Emphasis supplied.)

The air controllers were prompted to violate the law in the first place by their poor working conditions. They were reluctant to return to work because of the specter of unfair treatment, a specter which the court found was not without basis. Therefore, of course, the court could properly take into account the threat of heavy-handed treatment by the FAA when it decided to grant the FAA the relief the FAA had requested, and of course it could tailor its relief to encourage labor peace. As Judge Judd noted, the Government wanted the air controllers back on their jobs. The administrative procedures governing the Government's handling of the controllers' actions were, therefore, crucial factors for the court to consider if labor stability were to be promoted, and if the controllers were to be ordered back to work pursuant to judicial decree and under the threat of the exercise of the court's contempt power. Inasmuch as the issues concerning the fairness of the Government's disciplinary procedures were pending in *Leyden,* it made good common sense to preserve the status quo by telling the Government to withhold discipline until the propriety of its disciplinary procedures had been determined. It is not the act of a responsible government agency broadly to seek court intervention by injunction, obtain it, and then, hiding behind the inherent equity powers of the court, seek, by executive action, to nullify unfairly the status quo the court created at the agency's request.

The majority also states that because "[t]he order protects only participants in the work stoppage," "the trial court was not concerned with the general issue of proce-

dural fairness" p. 5. It suffices to say that obviously the involved air controllers were most vitally concerned with procedural fairness, and obviously were entitled to the assurance the court gave that they would not be subjected to questionable disciplinary procedures following their resumption of work until *Leyden* was judicially resolved.

The majority is also mistaken on a number of subsidiary points. *McTiernan* v. *Gronouski,* 337 F.2d 31 (2 Cir. 1964), and *Air Lines Pilots Assoc.* v. *Quesada,* 276 F.2d 892 (2 Cir. 1960), cited by the majority as giving the courts only a "limited permissible scope of judicial review" of disciplinary actions, are inapposite. In those cases the court was being asked to review what the Government had done in the past. The instant case arises from a government challenge to present action taken by its employees and a government request for affirmative present equitable relief. The question before Judge Judd was: In light of what the Government intends afterwards to do if the court orders an end to the work stoppage and the defendants return to work, should an injunction issue, and, if so, should conditions be attached to its issuance? The critical difference that undermines the precedential value of the cases cited by the majority is that here the Government initiated the suit and it was the Government that asked for equitable relief. Having sought equity it may be compelled to do equity. As stated in *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R. Co.,* 363 U.S. 528, 531-532 (1960):

> If the District Court is free to exercise the typical powers of a court of equity, it has the power to impose conditions requiring maintenance of the *status quo.* Conditions of this nature traditionally may be made the price of relief when the injunctive powers of the

court are invoked and the conditions are necessary to do justice between the parties.

See also *Yakus* v. *United States,* 321 U.S. 414, 440 (1944); *United States Air Conditioning Corp.* v. *Fogel,* 272 F.2d 879 (3 Cir. 1959). The fear of the air controllers that, if they returned to their jobs, they would be subjected to disciplinary procedures that do not comport with due process is a proper subject for judicial review. As noted above, these procedural questions, though inherent in the posture of the present cases when they were initially before Judge Judd, were also pending before him in *Leyden.* Due to the seriousness of the national problem created by the controllers' work stoppage and the dire consequences which would follow if a second stoppage should be precipitated by any unfair treatment of the controllers after they returned to work, it surely was wise for the court to stay the disciplinary hand of the FAA until the court could conduct a full inquiry into the questioned FAA procedures.

The majority also argues that the injunction against the Government "flies in the face" of 5 U.S.C. §7311.[4] With deference, it is obvious that this conclusion is incorrect; the court merely ordered the Government to hold all disciplinary measures against the controllers in abeyance until the issues in *Leyden* were resolved. It is perfectly clear that the FAA cannot legitimately invoke §7311 in an unconstitutional manner, and when, as here, disciplinary procedures are questioned as being unconstitutional, the court has the power temporarily to enjoin the Government from exercising its disciplinary function.

Finally, the FAA admits that it intends to dismiss only a small number of controllers who were leaders in the

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4 The statute is set out at the end of the majority opinion.

strike and to suspend or otherwise discipline certain others. This proposed course of action is action which indeed "flies in the face of the statute," for 5 U.S.C. §7311 speaks in absolute terms.[5] The Congress has told the FAA that, if the controllers are found to have participated in a strike, the agency is compelled by the statute to discharge *all* controllers who are found to have participated in that strike. It is highly inconsistent for the FAA to cite §7311 to the judicial branch as a ground for vacating a judge's restraining order when the FAA itself unequivocally proposes to ignore the legislative branch's mandate. Although the above interpretation of §7311 admittedly puts the FAA in the dilemma of discharging all the controllers involved in the work stoppage or dropping its contention that there was such a stoppage, we cannot, as judges, scrap the meaning of so clear a statute in order to resolve the agency's dilemma for it. That task belongs to Congress, which, in light of increasing concerted action by public employees, should enact a more realistic statutory provision. When the

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5 This conclusion is strongly supported by the legislative history. The original version of the provision was included in an act entitled "An Act to *prohibit* the employment . . . " (emphasis added), 69 Stat. 624, Public Law 84-330, passed August 9, 1955, and read:

> No person *shall* accept or hold office or employment in the Government of the United States or any agency thereof . . ., who
>
> * * * * *
>
> (3) participates in any strike or asserts the right to strike against the Government of the United States or such agency . . . . (Emphasis added.)

The 1966 codification, part of Public Law 89-554, gave the section its present wording. Although "No person shall . . . hold" was changed to "An individual may not . . . hold" the Committee Report is overly explicit in stating that no substantive change was intended. Report (No. 1380) from the Committee on the Judiciary, United States Senate, to Accompany H.R. 10104, pp. 19-21 (1966). Indeed, the Report states:

> The words "may not" are used in the prohibitory sense, as "is not authorized to" and "is not permitted to." *Id.* at 20.

FAA asks a court to adapt a troublesome statutory provision to a new situation, it is unseemly for the FAA to argue that the equitable standards it would have the court reach to apply to the situation should not also be equitably applied to the parties the FAA has sued.

For all of the above reasons I would, without modification, uphold the preliminary injunctions[6] issued below.

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6 Both the majority and I have referred to "injunctions" throughout our opinions. However, between oral argument and the present decision, the Air Transport Association's appeal was dismissed on September 11, 1970 upon stipulation. Hence only the merits of the Government's case have been considered.

Opinion of the United States Court of Appeals in *United States* v. *Moore, et al.*

[427 F.2d 1020 (10th Cir. 1970)]

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Nos. 224-70, 225-70

June 8, 1970

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

—v.—

ROBERT D. MOORE, Branch Chairman, PATCO, Rocky Mountain Chapter, *et al.*,

Defendants-Appellees.

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

—v.—

CLINTON H. ABNET *et al.*,

Defendants-Appellees.

Before LEWIS, *Chief Judge,* and BREITENSTEIN and HICKEY, *Circuit Judges.*

HICKEY, *Circuit Judge.*

This matter presents the question of whether the district court abused its discretion when it granted the defendants' "Motion for Protective Orders and Stay of Administrative Action" on April 27, 1970. Upon granting the motion, the court issued the order here in controversy which stated in part as follows:

> "It is therefore ordered, adjudged and decreed:
>
> "1. That the indefinite suspensions of F.A.A. employees and defendants Rex B. Campbell, Gerald W. Phillips and Robert D. Moore, now in effect, shall be withdrawn by the F.A.A. and the said defendants return to pay status immediately.
>
> "2. The removal of F.A.A. employee Joseph M. Schrodt effective April 21, 1970 shall be rescinded by the F.A.A. immediately.
>
> "3. That F.A.A. shall take no further administrative actions, consisting of proposed suspensions or removals from the rolls or other sanctions against any F.A.A. employees who are defendants in these actions and subject to the Preliminary Injunctions issued by this Court, based upon the alleged work stoppage between March 25, 1970 and April 13, 1970.
>
> "4. The F.A.A. shall not be precluded from taking or initiating any administrative actions in ordinary conduct of its affairs with respect to its employees in these actions apart from the provisions of the Preliminary Injunctions."

On April 28, the government filed its motion for a stay of the order pending appeal. This court, by order dated

April 29th set the matter down for argument on the merits on May 7, 1970. We affirm.

For an adequate understanding of the problems presented by the appeal, a brief statement of the facts is necessary.

On March 30, 1970 the United States on behalf of the Federal Aviation Administration (F.A.A.) filed a complaint in the United States District Court for the District of Colorado naming as defendants seventeen individual air traffic controllers, and the Professional Air Traffic Controllers Organization (PATCO). The complaint charged that on March 25, 1970, a large number of air traffic controllers absented themselves from their work thereby engaging in an illegal strike against the air traffic control system thereby disrupting air traffic throughout the nation resulting in immediate and irreparable damage to the United States of America.

The F.A.A. sought and received a temporary restraining order which prohibited PATCO and the individual defendants from engaging in or continuing or encouraging the strike; directed the individual defendants to return to work; and directed both the individual defendants and PATCO to take such steps as were necessary to have other members of PATCO resume their normal employment duties.

On April 6, 1970 the United States on behalf of the F.A.A. commenced a separate civil action naming 103 additional individual air traffic controllers as defendants. The allegations in this action were identical to the allegations contained in the previous action and the F.A.A. secured a similar temporary restraining order directed at these defendants.

Subsequently the temporary restraining orders were continued for an additional period of time to enable plaintiff to secure service of process upon the defendants named in the action. The two civil actions were then combined and upon effectively completing the service of process and with the consent of the defendants served, the temporary restraining orders previously issued were converted into a preliminary injunction. An answer, together with a counterclaim, was filed by the defendants and the matter is now at issue before the district court.

During the time the civil actions were being filed in the district court, the F.A.A. served notice of its intention to impose sanctions upon many of the defendants for their activities in connection with the alleged strike. The proposed sanctions included permanent removal from employment and suspensions from duty either for a set period or an indefinite period of time. Other sanctions were actually imposed upon the defendants, including the withholding of pay for the period of each defendant's absence from work.

Following their return to work after the issuance of the preliminary injunction by the court,[1] the F.A.A. commenced administrative action to carry out the proposed removal and suspension of the various defendants. The basis of the proposed agency action was the charge that these individuals had engaged in and participated in an illegal strike against the government of the United States in violation of 5 U.S.C. § 7311 and that they had failed to comply with

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[1] We note that we have been informed that certain of the defendants may not have returned to work as directed by the restraining orders and preliminary injunctions. However this facet of the case is not now before the Court. Criminal contempt charges have been brought against certain of the defendants and are now pending in the Federal District Court.

an order issued by the United States District Court for the District of Columbia in a separate action.

Effective April 20, 1970, several defendants were placed in a status of indefinite suspension, a non-pay status, by virtue of the administrative action. At least one defendant was permanently removed as an employee of the F.A.A.

The defendants then moved the court for Protective Orders and a Stay of Administrative Action. The motion was filed and argued on April 24, 1970. The court granted the motion and as above noted, entered an order directing that the indefinite suspensions and removal of the individual defendants be withdrawn and that the F.A.A. take no further administrative action, consisting of proposed suspensions or removal or other sanctions against any F.A.A. employees who were defendants in the action subject to the preliminary injunctions issued by the court.

[1] Although this order may not be a final order for purposes of 28 U.S.C. § 1291, it clearly falls within § 1292 (a)(1) of that title which allows the courts of appeals to review interlocutory orders which grant or deny issuance of certain injunctions. Since this order effectively enjoins the F.A.A. from taking certain action, we conclude we have jurisdiction to hear this appeal.

The issue raised by the government is whether the order of the district court was an abuse of discretion. The government's argument in this regard is based upon several points.

Initially the government argues that a motion for interlocutory relief is not granted automatically, and that to be granted such relief the defendant should be required to satisfy the court that: (a) it is likely to prevail on the

merits; (b) without the relief it will be irreparably injured; (c) that the issuance of the stay would not substantially harm other parties; and (d) that the public interest would be aided by the issuance of such a stay. Virginia Petroleum Jobbers Ass'n v. Federal Power Comm., 104 U.S.App.D.C. 106, 259 F.2d 921, 925 (1968); Belcher v. Birmingham Trust Nat. Bank, 395 F.2d 685 (5th Cir. 1968). Unlike Associated Securities Corp. v. Securities & Exchange Comm., 283 F.2d 773 (10th Cir. 1960), the matter here before us is not the order of an administrative agency but is the order of a trial court, entered in aid of its jurisdiction in enforcing a prior preliminary injunction, the merits of which are not involved in this appeal.

The federal courts have power to issue such writs and orders as are necessary to protect their jurisdiction. Title 28 U.S.C. § 1651 of the United States reads as follows:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

In re Quick Charge, Inc., 69 F.Supp. 961, 969 (D. Okl. 1947), reversed on other grounds, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 886 v. Quick Charge, Inc., 168 F.2d 513 (10th Cir. 1948), the court said:

> "It is [a fundamental principle] that a court of equity has the inherent power to issue such orders and injunctions that may be necessary to prevent defeat or impairment of its jurisdiction. If these fundamental principles were not so inherent in the court, such a court would indeed be a feeble arm of government and for all practical purposes would be a nullity."

The government further argues that the district court abused its discretion by ordering that the F.A.A. abstain from censuring the named employee-defendants because the defendants have not exhausted their administrative remedies. The order herein considered did not come into existence as the result of administrative procedure, but is the act of a trial court protecting its prior determination which was in the nature of a mandate to return to work.

The order appealed from does enjoin the F.A.A. from taking any administrative action against named defendants for their participation in the work slow-down. However, upon the conclusion of the initial lawsuit in the district court, the F.A.A. will be free to impose against the defendants whatever sanctions are authorized by the applicable administrative regulations.

The purpose and effect of the court's order is limited to a restoration of the "status quo" that existed prior to March 25, 1970, pending determination of the issues contained in the civil actions seeking a permanent injunction. The action taken by the district court has precedent to support it.

In Brotherhood of Locomotive Engineers et al. v. Missouri-Kansas-Texas R. Co., Inc., 363 U.S. 528, 80 S.Ct. 1326, 4 L.Ed.2d 1379 (1960), the district court's similar action was upheld by the Supreme Court in the following language:

> "If the district court is free to exercise the typical powers of a court of equity, it has the power to impose conditions requiring maintenance of the *status quo*. Conditions of this nature traditionally may be made the price of relief when the injunctive powers of the court are invoked and the conditions are necessary to

do justice between the parties. * * * '[The court] will avoid * * * injury so far as may be, by attaching conditions to the award * * *.' Yakus v. United States, 321 U.S. 414, 440, 64 S.Ct. 660, 674, 88 L.Ed. 834. '[I]t is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all * * * whose interests the injunction may affect.' Inland Steel Co. v. United States, 306 U.S. 153, 157, 59 S.Ct. 415, 417, 83 L.Ed. 557. Since the power to condition relief is essential to ensure that extraordinary equitable remedies will not become the engines of injustice, it would require the clearest legislative direction to justify the truncation of that power." Supra, 363 U.S. at 531, 532, 80 S.Ct. at 1329.

Because of the nature of the order appealed from, cases concerning issuance of various preliminary injunctions by district court judges are persuasive. Thus, in Flight Engineers' Inter. Ass'n, etc. v. American Airlines, Inc., 303 F.2d 5 (5th Cir. 1962), it was held that the fact that a hearing may ultimately result in a contrary decision does not deprive the district court of its power to grant interim preliminary relief to enable serious judicial controversy to be settled in an orderly fashion.

"[The court may] preserve the status quo pending a judicious, calm and orderly judicial determination of this judiciable problem. That is the classic office of a preliminary injunction. So much so is it that on review of such an interlocutory order, we do not examine into the merits as such. The probable merits are looked to only insofar as they bear on the question whether the trial court abused its discretion in granting interim relief." *Supra,* 303 F.2d at 11.

The district court was well within its authority when it imposed conditions resulting in the restoration and preservation of the status quo pending determination of the issues presented by the complaint which seeks the issuance of a permanent injunction.

The order of the district court was in aid of its jurisdiction over the parties and subject matter of the appellant's complaint. The court had jurisdiction over the appellees named in the complaint. The district court was vested with the authority to determine whether the appellees were engaged in an illegal strike. Even though the parties apparently agreed to the issuance of a preliminary injunction following service of the temporary restraining order, a determination has not been made that the strike, or work slow-down, was an illegal strike against the government. The effect of the preliminary injunction was to order the defendants back to work pending determination of the complaint brought by the F.A.A. The action of the F.A.A. in indefinitely suspending certain defendants and removing others has the effect of placing the cart before the horse, thereby circumventing the orderly process chosen by them to determine the real issues.

[2] We therefore find that the district court was acting within powers granted to it by Title 28 U.S.C. § 1651(a), to maintain jurisdiction over the parties involved in the lawsuit, and restore the status quo in aid of its jurisdiction. The court granted the order to effect an orderly and equitable disposition of the lawsuit. Accordingly, we find that the district court did not abuse its discretion granting the stay.

Affirmed.

LEWIS, *Chief Judge* (concurring).

I concur. It appears to me the United States is in no tenable position to assert that the action of the district court violated the doctrine of separation of powers. The government chose to invoke the judicial power as an aid to executive function, seeking and obtaining a temporary restraining order later merged, by agreement, into a preliminary injunction on representation of employee action amounting to an illegal strike. The United States still persists in seeking a judicial determination in this action that the employee action was illegal and asks for a permanent injunction based on such contention of illegality. The contention has been consistently opposed both in law and fact by the subject employees and the ultimate issue is unresolved and pending. And yet, when the mandate of the judicial power was used effectively to bring the employees back to work, the agency promptly applied stringent administrative discipline to the subject employees premised on an agency executive determination of the very issue that the court now has before it. To me, such action can only amount to an attempt to turn the judiciary on and off like a light globe to suit the whims of the agency. The trial court had every jurisdictional and discretionary right to protect the integrity of the judicial issue and its order.

I agree with my Brother Breitenstein that practicality may indicate that the administrative process may now best serve to determine both the individual rights of the involved employees and also the initial determination of whether an illegal strike did occur. But if this be so, the government should seek to have the preliminary injunction dissolved as having served its purpose and should withdraw its petition for a permanent injunction.

BREITENSTEIN, *Circuit Judge* (dissenting).

I respectfully dissent. In my opinion the district court abused its discretion and violated the principle of separation of powers when it issued the protective order forbidding the FAA to take administrative disciplinary action against certain of its employees.

Discharge, suspension, and other matters relating to their personnel are functions entrusted to federal administrative agencies. Judicial review of actions pertaining thereto is limited to consideration of whether the applicable procedures were followed and whether the action taken was arbitrary or capricious. See 5 U.S.C. § 7501; McGhee v. Johnson, 10 Cir., 420 F.2d 445, 447; Bishop v. McKee, 10 Cir., 400 F.2d 87, 88; Meehan v. Macy, 129 U.S. App.D.C. 217, 392 F.2d 822, 830; and Mancilla v. United States, 9 Cir., 382 F.2d 269, 270, cert. denied 390 U.S. 982, 88 S.Ct. 1104, 19 L.Ed.2d 1280.

No precedent of which I am aware authorizes the federal judiciary to enjoin disciplinary action by the federal executive branch or one of its agencies. The object of separation of powers "is basic and vital," O'Donoghue v. United States, 289 U.S. 516, 530, 53 S.Ct. 740, 77 L.Ed. 1356, and "deeply rooted in the constitutional divisions of authority in our system of Government," Perkins v. Lukens Steel Co., 310 U.S. 113, 132, 60 S.Ct. 869, 879, 84 L.Ed. 1108. See also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 and especially concurring opinion of Justice Frankfurter, 593-595, 72 S.Ct. 863, 96 L.Ed. 1153. Judicial interference with ordinary executive duties will produce nothing but mischief. Decatur v. Paulding, 14 Pet. 497, 516, 39 U.S. 497, 516, 10 L.Ed. 559.

The majority hold that the protective order effected a permissible restoration and maintenance of the status quo and was issued in aid of the district court's jurisdiction as authorized by 28 U.S.C. § 1651. These reasons, considered either separately or collectively, do not warrant the judicial encroachment on executive powers which results from the protective order.

I find nothing in the decision in Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Co., 363 U.S. 528, 80 S.Ct. 1326, 4 L.Ed.2d 1379, that is either controlling or persuasive. First, neither that case, nor any upon which it relies, related to a federal court injunction against the exercise of federal executive discretion. The issue of separation of powers was simply not present. Second, the rationale of Locomotive Engineers reveals its inapplicability to the present case. The Court there said, "the power to condition [injunctive] relief is essential to ensure that extraordinary equitable remedies will not become the engines of injustice * * *." 363 U.S. at 532, 80 S.Ct. at 1329. Accordingly, the Court held that restoration or maintenance of the status quo is a proper tool where the granting of equitable relief at the behest of one party would occasion grave injustice to the other. We have no such situation. The pertinent aspects of the status quo are (1) the defendants were employees of FAA, and (2) FAA had the power to discipline its employees. An injunction against collective actions of the defendants does not of itself subject any of them to any disciplinary action. The power of the FAA to discipline its employees in no way depends on the equitable relief which it requested from the court. In short, there is no relationship, as there was in Locomotive Engineers, between the equitable relief

requested and the situation to which the protective order is directed.

The majority justify the order as one issued in aid of the district court's jurisdiction. In ordinary circumstances, federal courts have both inherent and statutory power to issue orders to ensure that their lawful orders are carried out and obeyed. 28 U.S.C. § 1651. See Faubus v. United States, 8 Cir., 254 F.2d 797, cert. denied 358 U.S. 829, 79 S.Ct. 49, 3 L.Ed.2d 68, and Mississippi Valley Barge Line Co. v. United States, E.D.Mo., 273 F.Supp. 1, affirmed Osbourne v. Mississippi Valley Barge Line Co., 389 U.S. 579, 88 S.Ct. 692, 19 L.Ed.2d 779. See also Federal Trade Commission v. Dean Foods Co., 384 U.S. 597, 86 S.Ct. 1738, 16 L.Ed.2d 802. Determination of the need for the order under review to protect the court's jurisdiction requires consideration of the preliminary injunctions which the order seeks to protect.

The preliminary injunctions enjoined the defendants from "continuing, encouraging, ordering, aiding, engaging or taking any part in" any work stoppage, from interfering with the movement of air traffic, and from taking any action which would interfere with the court's jurisdiction. These mandates were obeyed when the various defendants returned to work. The disciplinary procedure contemplated by FAA will not bring the affected defendants into a state of noncompliance with the preliminary injunction. Terminated or suspended employees will not be engaging in a collective work stoppage. Their failure to work will result from FAA, not their own, action. In my opinion protection of certain employees against discipline is not needed to ensure compliance with the preliminary injunctions.

Even if the effect of the preliminary injunctions was to get the men "back to work," the FAA disciplinary actions

will not adversely affect the integrity of the injunctions. Their purpose was to halt the work stoppage which impeded air traffic. That purpose was achieved and air traffic has returned to normal. The proposed action of FAA will not undermine the accomplishment of that purpose. Nothing is shown to indicate that it will create another air transportation crisis. The FAA plans to exact sanctions, where appropriate, which will not hamper the operations of the air traffic control facilities. The proposed disciplinary action will not impair the effect of the preliminary injunctions or any other action which the district court may take on the issues of whether the work stoppage was an illegal strike which should be permanently enjoined.

The termination or suspension of various defendants will not affect the court's jurisdiction over either them, their codefendants, or the subject matter. The theory of the defendants seems to be that judicial determination of participation in the work stoppage must precede administrative disciplinary action. In view of the executive discretion in personnel matters, I am not persuaded. I agree with the government that the 100 or more individual situations should be initially filtered through the administrative process with court review of arbitrary or capricious action.

My associates say that the FAA disciplinary action "has the effect of placing the cart before the horse" and circumvents the orderly process which the FAA chose to determine the real issues. This position assumes that the imposition of discipline and the lawsuits involve identical issues and that, therefore, the former must await decision of the latter. I do not agree. The issue in the lawsuits is whether there was an illegal strike. The resolution of this issue will not foreclose the right of FAA to impose disciplinary

sanctions subject to limited court review. A judicial decision that the work stoppage was not an illegal strike will have no effect on the power or right of FAA to impose such sanctions as it may deem necessary in the interests of public safety and employee morale, i.e., the "efficiency of the service." See 5 U.S.C. § 7501 and Bishop v. McKee, 10 Cir., 400 F.2d 87, 88. It is not a question of the cart before the horse because there are two different horses and two different carts.

The defendants have made no attempt to show that they are likely to prevail on the merits. Irreparable injury has not been established. There is no claim that the protective orders are needed to prevent substantial harm to other interested persons or to the public interest. These conditions should be met before a court enjoins administrative action. See Associated Securities Corporation v. Securities and Exchange Commission, 10 Cir., 283 F.2d 773, 774-775.

In support of its motion for a stay of the protective order, the FAA filed in this court the affidavit of the Chief, Air Traffic Branch, Denver area. The affidavit is not controverted. The affiant states:

> "The agency [FAA] has determined that the best interests of the Government, the safety of the general public and the welfare of their fellow workers would best be served if 16 of the strikers are not returned to their regular air traffic control duties."

I respectfully suggest the doctrine of separation of powers requires that the courts must recognize the powers, duties, responsibilities, and expertise of the FAA with regard to the protection of the public interest. The district court abused its discretion when it substituted its judgment for that of the FAA.

Opinion and Order of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

July 10, 1970

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

No. 18574 VS.

WILLIAM J. PLASCH, *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

This case comes before the Court on the Government's emergency motion for an expedited hearing on its motion for summary reversal. The Government appeals from a preliminary injunction entered May 4, 1970. The injunc-

tion orders defendant Air Traffic Controllers to return to their jobs, and restrains the Government from exercising or threatening punitive sanctions against defendants for the work stoppage. Only the latter part of the order is assailed on appeal. A hearing on the permanent injunction is scheduled for July 20.

The Court will proceed to consider the case as an expedited appeal under Rule 2, Federal Rules of Appellate Procedure.

The Government challenged a preliminary injunction containing substantially the same terms in the Tenth Circuit cases of *United States* v. *Moore,* No. 224-70, and *United States* v. *Abnet,* No. 225-70, decided June 8, 1970. The Court upheld the injunction, but each judge on the panel filed a separate opinion. Judge Hickey affirmed the injunction against the Government as within the court's power to protect its jurisdiction in the case. Chief Judge Lewis concurred, but stated that if the Government wished to proceed with administrative action against defendants, it should seek to have the preliminary injunction dissolved and withdraw its petition for a permanent injunction. Judge Breitenstein dissented. He believed the district court violated the principle of separation of powers by forbidding the Federal Aviation Agency to take disciplinary action against its employees.

The Government's posture is somewhat different in our case from that in the Tenth Circuit. In its motion for summary reversal, the plaintiff states it has no objection to our vacating the entire preliminary injunction, and says that it unsuccessfully moved in the district court on June 22 for dismissal of its complaint.

The district court had power under 28 U.S.C. §1651 to issue any writ necessary or appropriate in aid of its jurisdiction. The Supreme Court has upheld comparable action in a labor dispute to restore the *status quo* pending determination of the petition for a permanent injunction. *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R. Co.*, 363 U.S. 528.

The Government argues that a court may restore the *status quo* in a strike situation only by ordering an end to the strike, without concern for what the employer does to the employees. On the contrary, in a situation like this one, the court may be able to end the "strike" only by providing that the employees may not be discharged or suspended pending a determination of all the issues. In this case restraining orders, which did not protect defendants from punishment, did not succeed in getting them back to work. Defendants returned to their jobs only when assured they would not be punished while the case was pending.

The Court concludes that the district court did not abuse its discretion in protecting its duty to make a final decision in the case in an atmosphere of calm and orderly judicial determination. See *Flight Engineers Inter. Assn.* v. *American Airlines, Inc.*, 303 F.2d 5 (5th Cir. 1962).

The Court affirms the present preliminary injunction, unless within five days herefrom the parties stipulate to a dismissal. In that event, the Court will vacate the preliminary injunction and order the district court to dismiss the case.

Opinion of the United States District Court in *United States* v. *Professional Air Traffic Control Organization, et al.*

[313 F.Supp. 181 (E.D.N.Y. 1970)]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 70-C-410

April 7, 13, May 5, 1970

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION (PATCO), its officers, agents, servants, members, *et al.*,

Defendants.

JUDD, *District Judge.*

MEMORANDA

In two actions for injunctions against work stoppages by federal employees, oral memoranda were placed in the record as occasion required, and are assembled here.

Following calls by several hundred air controllers in many cities of the United States on March 25th and 26th, 1970, that they were too sick to work, Air Transport Association of America (ATA) and thirteen member airlines brought the first action, 70-C-400, against Professional Air

Traffic Controllers Organization (PATCO), its officers and directors and various of its leaders in the metropolitan area, and approximately 200 individual members, to enjoin the work stoppage, to direct them to perform their statutory duties and for damages.

The court on March 30th signed an order to show cause for a preliminary injunction with a temporary restraining order against any concerted refusal to work.

Two days later, the United States of America filed the second injunction action, 70-C-410, against PATCO and its officers and members and certain of its leaders in the metropolitan area. The court issued an order to show cause for a preliminary injunction and a temporary restraining order in terms basically similar to those in the ATA order.

The absence of the Controllers continued in spite of the temporary restraining order. ATA presented an order to show cause which the court signed on April 6th and which was served on the Controllers personally that night, directing them to appear in court on April 7th (the adjourned date for hearings on the preliminary injunction) and show cause why they should not be punished for contempt of court for violation of the ATA restraining order.

Memorandum on Standing of Plaintiffs in 70-C-400 (April 7, 1970)

[1] In connection with the motion of defendants in 70-C-400 to dismiss the airlines' complaint for lack of standing, I have given considerable thought to the motions, and have reviewed the materials that have been submitted to me.

The complaint charges an illegal conspiracy to violate the United States statute which forbids anyone to hold a

position with the United States government while he participates in a strike or asserts the right to strike or is a member of an organization of employees that he knows asserts the right to strike against the government. 18 U.S.C.A. § 1918. This is one of the laws of the United States which it is my sworn duty to uphold.

The complaint alleges that an illegal work stoppage has occurred by concerted action of the defendants, based on false assertions of illness, that this is a strike, and that it has caused serious financial damage to the airline plaintiffs and interferes with their normal operations.

One of the reasons for the federal statute against strikes by federal employees is that the employees are performing an essential service, for the benefit of the public, and also for the segment of the public which the particular employees serve.

The tendency of recent judicial decisions has been to permit private actions for violation of federal statutes.[1] In this case, the damages allegedly incurred by the plaintiff airlines were readily foreseeable by defendants prior to the work stoppage, and are so direct a consequence of the allegedly illegal action that the persons who are directly affected by the work stoppage should have the right to sue for an injunction. I do not have to determine at this time the plaintiffs' right to damages against individual air Controllers or against PATCO.

This is not a suit against the United States, but against individuals and an organization who owe duties to the United States and to the users of airport facilities. The concept of privity no longer has much application to civil

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[1] Borak v. J. I. Case Company, 317 F.2d 838, 848-849 (7th Cir. 1963); Office of Communication v. Federal Communications Com-

actions.[2] In any case, I will not treat any requirement of privity as a bar to this action.

The right to mandamus against the individual airport Controllers involves questions which I have not yet resolved. But the right to an injunction can be supported by proof of concerted illegal action whose reasonably foreseeable effect is to cause harm to the airlines which cannot be fully remedied by money damages.

The rights of Air Transport Association are not as direct as those of the individual airlines. However, in a suit by thirteen separate airlines, there is need for some centralized control in the interest of efficient conduct of litigation. One purpose and function of the Air Transport Association is to promote and defend the interests of its several member airlines. This seems to me to justify letting the Association remain as a party as well as its component airlines.

Therefore, the motion to dismiss the complaint for lack of standing is denied, without prejudice to future consideration of the portions of the complaint which seek money damages or mandamus.

Memorandum on Issuance of Temporary Injunction
(April 13, 1970)

The order which I am about to sign with the consent of the defendants, disposes of the pending motions for preliminary injunction temporarily, and I hope on a basis that will not require further hearings.

More than forty years ago it was recognized that the labor injunction frequently constituted an abuse of judi-

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[2] Prosser, The Fall of the Citadel, 50 Minn.L.Rev. 791 (1966).

cial power.[3] It may be remembered that Circuit Judge John J. Parker, an eminent jurist, was denied confirmation as a Justice of the United States Supreme Court because he had upheld a "yellow dog" contract,[4] at a time when United States Supreme Court decisions permitted prohibitions against private employees belonging to a union.[5]

More than a generation ago, the labor injunction was outlawed in private matters except for very limited situations, primarily where it could be used to maintain labor peace while impartial mediation took place.[6]

[2] Although the Norris-LaGuardia Act does not apply to strikes by United States government employees, the court endeavored to apply its principles in this case at the outset. Even the United States must do equity when it seeks the aid of an independent court of equity.[7]

An injunction acceptable to both sides, conditioned on impartial mediation, proved impossible because it was pointed out that PATCO has not been certified as a representative of the air Controllers. At the close of the hearing on Friday, April 10th, it was disclosed that one reason

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[3] Great Northern Ry. Co. v. Brosseau, 286 F. 414 (D.N.D. 1923). See also the dissenting opinions of Holmes, J. and Brandeis, J. in Truax v. Corrigan, 257 U.S. 312, 343, 366-367, 42 S.Ct. 124, 133, 1142, 66 L.Ed. 254 (1921).

[4] International Organization, United Mine Workers of America v. Red Jacket Consol. Coal & Coke Co., 18 F.2d 839 (4th Cir. 1927). See Rayback, A History of American Labor (1959) 319.

[5] E.g., Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 38 S.Ct. 65, 62 L.Ed. 260 (1918).

[6] Norris-LaGuardia Act, 29 U.S.C. §§101-115, effective March 23, 1932.

[7] See Luckenbach S.S. Co. v. The Thekla, 266 U.S. 328, 339-40, 45 S.Ct. 112, 113, 69 L.Ed. 313 (1924); Deseret Apartments, Inc. v. United States, 250 F.2d 457, 458 (10th Cir. 1957).

why PATCO's petition for certification has not been granted is that F.A.A. has challenged its status. On the preceding day, the regional Vice President of a rival organization admitted that PATCO now claimed over 400 members from the New York area while the rival organization's membership had declined from 350 to 135.

The federal law makes it a crime for a government employee to participate in a strike or to belong to an organization which claims the right to strike, while he is a government employee.[8]

The labor injunction therefore comes back into the public employee situation as a milder means of enforcement than the criminal penalty for strikes, but it comes back in a procedure where the employees do not have the right to a jury trial and where they are not subject to the requirement of proof beyond a reasonable doubt which would exist in the enforcement of a criminal statute.

[3] The labor injunction, even as a substitute for criminal enforcement, should be used only as a last resort.

[4] The present order, which substitutes a temporary injunction for the previous ex parte restraining order, directs the air Controllers to return to work, with a concomitant requirement that their employer, the Federal Aviation Administration, shall permit them to return without any conditions.

The order is based on the consent of the defendants, because I am entering it before they have presented any evidence. It is limited to a three-week period, so that we can determine what the developments are during that period,

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[8] 18 U.S.C. §1918.

and whether it will be necessary to take more testimony on the motions for preliminary injunction.

The order is based on the need for urgent resolution of the present work stoppage, and the possibility that long hearings may be necessary to establish whether the individual defendants are in contempt of the temporary restraining order and whether there are circumstances which might mitigate any penalties for violation of the order.

The order is based on the fact that more than three full days of testimony have resulted in showing that the following facts have been established prima facie to the satisfaction of the court, subject to possible rebuttal by the defendants:

1. PATCO is an Iowa corporation organized to represent air Controllers in respect of their compensation and working conditions, and having a place of business within the Eastern District of New York.

2. Since March 25, 1970, the number of absences from work by air Controllers on account of alleged illness has increased from the normal average of 4% to a total of more than 60% at the facilities in the New York area.

3. Officers of PATCO publicly announced their intention to stop work on March 25, 1970 unless their demands upon F.A.A. were met, and they encouraged the air Controllers to claim that they were ill and to stay away from work. Background of those demands has not yet been set forth in the evidence because I have not heard the defendants' case.

4. The work stoppage represents a concerted action on the part of the air Controllers in the New York area.

5. There have been substantial reductions in the number of flights in and out of the New York area as a result of the work stoppage.

6. The maintenance of normal flight conditions is important to the public interest, to the national defense, and to the member airlines of plaintiff Air Transport Association, Inc.

7. The public and the plaintiffs in 70-C-400 are suffering irreparable damages as a result of the work stoppage, which still continues.

Therefore, I conclude that there is probable cause to believe that the defendants have violated their statutory duty to refrain from strike action, and that there is no adequate legal remedy to protect the plaintiffs' interests.

I believe that what I am doing is within my power because I think I can impose conditions that are appropriate on the granting of the relief that the plaintiffs request, and it is the best way to resolve the situation. Accordingly, I am signing one order in 70-C-400 and another in 70-C-410 with the same terms.

Memorandum on Granting of Preliminary Injunction
(May 5, 1970)

I have called this session pursuant to a proposal which I submitted to the parties at a hearing on April 16th, because I thought it important to achieve a greater degree of labor peace and to do it on terms that don't have a near termination date. (The proposal contemplated extension of the temporary injunction to continue until the determination of the action, granting of procedural rights to

the air Controllers in F.A.A. disciplinary proceedings, and a change in the timetable for further proceedings in the case.)

I have considered all the papers that were submitted and the arguments made this morning and have gone through the file from the beginning, and I now want to put in the record this Memorandum of Decision.

In three days of hearings the plaintiffs presented evidence which the court described as establishing a prima facie case of concerted refusal to work in violation of the federal anti-strike statute.

After discussion between the court and the parties, a temporary injunction was signed on April 13th, with the consent of the defendants, which enjoined the continuance of the work stoppage and directed the individual defendants to return to work. The government did not consent to the order because it included a direction that the F.A.A. should permit the individual Controllers to return to work without condition. The ATA did not consent to the order because it was limited in time and because ATA wished to complete the plaintiff's case by putting each defendant on the stand to answer questions about his reasons for not working.

The court considered that this was not necessary for the plaintiff's prima facie case and that even proceeding immediately to the defendants' case would not permit the conclusion of the hearings and restoration to work as quickly as the form of temporary restraining order that was signed.

The government stated that the question whether it exercised administrative proceedings or deferred them was under review, and the court stated that the injunction did not

prevent disciplinary proceedings. The men returned to work within twenty-four hours after the temporary injunction was signed.

The court appointed a board of medical examiners to examine any men who claimed still to be unable to return to work. It made a report on 28 men and found 13 fit for duty without condition and gave a medical description of the others. The reason for my making the temporary restraining order for three weeks only, with some extensions since, was that the Controllers requested amnesty as one of the terms for disposing of the matter and that amnesty had reportedly been extended to Post Office workers recently after a shorter strike.

The court hoped that continuing administrative review by the government might bring some result short of amnesty that would satify the defendants that they were being fairly treated. It seemed clear to the court that there could be no mediation or amnesty while the men were away from work, but that the possibility existed of some meaningful negotiations after they returned to work. In order to avoid any risk of a new stoppage at the end of the injunction period, the court a few days later submitted a proposal to the parties for indefinite extension of the injunction.

By the time comments were received on this problem, it appeared there was no change of administration policy which was calculated to take account of any mitigating circumstances in connection with the work stoppage, and there was evidence that transfers of duty were being used in a punitive way and that the limited nature of review of any disciplinary action gave the defendants the idea that they would not be fairly dealt with in the administrative procedure.

The court still considers it clear that a strike by federal employees is illegal, treating the statute as constitutional, and that there is a prima facie case of an illegal work stoppage. The preliminary injunction was based on that assumption.

Individual affidavits from the defendants now assert that the men were not acting in concert, and that each one was suffering from extreme nervous exhaustion and fatigue, and some from additional illnesses, which were caused by the working conditions imposed on them by the F.A.A.

[5] These affidavits would create real issues as to findings of contempt against any individuals, but the court deems it possible that 200 people would not all experience the same degree of exhaustion on the same day and recover on the same day. Therefore it believes that the facts shown in the affidavits don't prevent a finding of probable success of the plaintiffs in obtaining an injunction, and that it is proper to extend the temporary injunction without hearing the individual Controllers.

The reports of defendants' counsel concerning their consultation with their clients after the proposal which I made on April 16th indicate that they will acquiesce in the form of preliminary injunction that I proposed, without requiring that the defendants' case be heard.

The court considers also that a substantial number of relatively highly paid men with specialized skills would not violate the law unless there was some provocation that they thought justified it, even though their belief in the justification might be erroneous.

There has been a reduction of compulsory overtime since the work stoppage, which did not come until after the work stoppage, and which suggests that the F.A.A. may, as al-

leged, have been unduly slow in relieving the pressure on the Controllers.

[6] I think I said before, and I say now, that those who knowingly disobey a law must face the penalty for the violation. They have no right to amnesty. Nevertheless, they are entitled to fair treatment in the administration of penalties, to consideration of mitigating circumstances, and to a procedure that is such, as far as the court can assure, as to make the defendants think it is fair.

I think it was said in the *Amos Treat* case that the procedure should have "the very appearance of complete fairness."[9]

[7] Even if a defendant pleads guilty to a crime, the court has a duty to consider individual circumstances before determining whether to impose any penalty.

There are mitigating circumstances shown here, even in the affidavit of ATA's counsel, which recites in quotations from the Corson Report on air traffic service[10] that "No single cause accounts for this crisis in the relation between F.A.A.'s management and the organizations representing its employees. Yet our observations suggest that among the most important is the failure of F.A.A.'s management at all levels to truly understand the role of the employee organizations and to accept them as not only legitimate, but hopefully as collaborators in building understanding, satisfaction, and an *esprit de corps*," and which recommends among other things that the F.A.A. "Expedite,

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[9] Amos Treat & Co., Inc. v. Securities and Exchange Comm., 113 U.S.App.D.C. 100, 306 F.2d 260, 267 (1962).

[10] Air Traffic Controller Career Committee Report, Jan. 1970, pp. 108-10.

in good faith, the resolution * * * of all existing labor-management problems."

Since this extract from the Corson Report is submitted by the plaintiffs, I think it is a factor that can be considered.

Also, the government has shown me a complaint which was filed in January in the District Court for the District of Columbia by PATCO against Secretary Volpe,[11] which alleges that the effect of the Federal Aviation Administration in not hiring additional staff and the burden of expanding air traffic had resulted in hours of service and conditions of service that cause exhaustion and enervation. The allegations in the complaint, which I presume are still to be determined, state that the air traffic Controllers generally, to the extent of 67.6 per cent. suffered pains over the heart and chest, to the extent of 81.1 per cent. vomited blood or coughed up blood or have done so since becoming air traffic Controllers, to the extent of 64.9 per cent. have many headaches, and that they—Paragraph 14—"are subject to an extraordinary and rapid deterioration of their physiological and psychological functions, and are caused to be in a state of poor health, frequently by the age of forty," many years sooner than would be the case if they were not subject to the conditions complained of.

The nature of the re-assignment of the men who returned to work and the nature of the notices to the public about the plans for disciplinary action and the nature of the notice of proposed disciplinary procedure do not indicate to me that the F.A.A. is considering the mitigating circumstances which are reflected by these charges.

The nature of administrative proceedings for discipline is at issue in another action in this court, where the rep-

[11] Civ. 101-70.

resentatives of the air Controllers ask for a determination that they are entitled to various procedural protections which don't exist in the present F.A.A. regulations.

In Leyden v. Federal Aviation Administration, 69-C-1566, they ask for the right to a recording and transcription of all proceedings, to production of all witnesses and evidence in support of charges, to confrontation and cross-examination of all witnesses, and to present both oral and documentary evidence on their behalf, among other things.

This has been disputed by the government and remains for decision.

[8] It seems to me rather incongruous in this case for the government to ask the court to compel the defendants to return to work and then immediately transfer them to different jobs and serve notice of intention to discharge. I said on April 13th that if the United States of America seeks equity, it can be compelled to do equity. The complaint in the government action asks that the men be directed to resume their normal employment. If I thought they were not going to be put to work I would have hesitated before ordering them back. I have been told that there is no power to enjoin administrative discipline, but I disagree.

One precedent is the similar case in the District of Colorado, where Chief Judge Arraj ordered the Federal Aviation Administration to take no further administrative action concerning any sanctions based on the work stoppage.[12] My proposed order may go farther in relation to the consideration of transfers which may be punitive rather than administrative.

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[12] United States v. Moore, et al. (D. Colo.), C-2175 and C-2186, order dated April 27, 1970.

Judge Parsons in Chicago entered a similar order,[13] although it was not quite as broad.

[9] Judge Lambros in Cleveland told me on April 9th that he had told the United States Attorney that the F.A.A. must not suspend the men who returned to work.[14] It seems to me that the men in New York should have the same rights as those in other states.

The facts alleged by Mr. Catterson in support of the order to show cause which I signed on May 1st, give ample support for a similar order here, pending a determination of what the F.A.A. is doing and what the rights of the men are.

Section 705 of Title 5 of the United States Code permits a court to issue a stay in aid of judicial review.

I recognize, as Mr. Morse said, that the Supreme Court in the *Goldberg* against *Kelly* decision mentions that government employment might be terminated without a prior evidentiary hearing.[15] But it did not say that there was no right to an evidentiary hearing. In fact, it said there is a constitutional right to present evidence orally and to confront and cross-examine adverse witnesses and that

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[13] United States v. Plasch, et al. (N.D. Ill.), 70-C-746, order dated April 9, 1970.

[14] United States v. Professional Air Traffic Controllers Organization, et al. (E.D. Ohio), C-70-320.

Since the various actions against air traffic controllers in sixteen different districts did not involve common pretrial discovery, they did not fit within the Rules of Procedure of the Judicial Panel on Multidistrict Litigation. By analogy to the procedures suggested in conflicting class actions, however, it seemed appropriate to resort to "Informal spontaneous consultation and cooperation between the concerned judges and courts." Manual for Complex and Multidistrict Litigation (West Pub. Co. 1969) p. 65.

[15] 397 U.S. 254, 263, 90 S.Ct. 1011, 1018 and n. 10 (1970).

an impartial decision is essential.[16] It is not clear that there is any impartial decision-maker in F.A.A. disciplinary procedure on suspension under 30 days, which may carry penalties of up to $1,000 or more.

The application of the *Goldberg* decision to this case, and the answers to the questions raised in the *Leyden* case, are not clear, and the need for clarification of those questions justifies a restraint on disciplinary proceedings until the procedural rights of the defendants are determined.

Judge Zavatt in the first *Leyden* case[17] said there was no proof of irreparable injury. But this is a different case, with more substantial penalties, and such a great number of individuals that equity jurisdiction would exist to avoid multiplicity of actions by deciding the procedural rights first. For the same reason the government's case on exhaustion of administrative remedies does not apply here. I don't base equity jurisdiction only on multiplicity of action, but I cite it as one factor to be considered.

Another factor is the special character of the defendants' employment, where there is no other possible employer to use the same skills while they are suspended or if they are discharged. So that there is more risk of irreparable damage involved here. Although the preliminary injunction runs for the duration of the action, my proposed restraint on the F.A.A. will run only until further order of the court. And I will entertain further applications in reference to it as soon as the District Court complaint in the District of Columbia and the *Leyden* case are decided, or before if there is good reason shown.

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[16] 397 U.S. at 269, 270, 271, 90 S.Ct. at 1021, 1022.

[17] Leyden v. Boyle, 69-C-1244, order dated October 22, 1969.

I have considered the case which was cited in a supplemental memorandum last night or this morning from the United States Attorney, McTiernan v. Gronouski, which is a Second Circuit case, cited as 337 F.2d 31, but that is a different case. That involved an appeal from a decision after dismissal, and the court pointed out that while disciplinary action involved executive discretion, it was subject to supervision to require compliance with statutory procedures and to guard against arbitrary and capricious action.[18] We have here to determine both the meaning of the Congressional direction and the question whether the F.A.A. is being arbitrary.

Finally, on this point I cite the decision of Judge Burger, the week before he became Chief Justice, where he found that "The administrative conduct reflected in this record is beyond repair," and he proceeded to exercise powers that really belonged to the Federal Communications Commission, but which it had shown itself to be incapable of performing properly. That case is the Office of Communication of United Church of Christ v. Federal Communications Commission, D.C.Cir., 425 F.2d 543, decided June 20, 1969,[19] and confirmed on a petition for rehearing *en banc* on September 5, 1969, with a memorandum which was even more critical of the administrative agency.

It is too early to say whether the actions of the F.A.A. are beyond repair, but Judge Burger's case shows the extent of the court's power to protect against improper procedure or agency action.

The order I propose to maintain the *status quo* is well within that power.

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[18] 337 F.2d at 34.

[19] Also reported in full in 16 R.R.2d 2095.

[10] Just another comment: I was told before that the court was wrong in seeking mediation before issuing the temporary injunction. In consider that it is always proper for a court to point out to litigants the disadvantage of fighting a case to the finish and to encourage conciliation. I think that is especially true here, where there was little evidence of meaningful negotiations before the work stoppage began.

I have prepared a preliminary injunction which I am going to modify in one respect in the light of what Mr. Halloran said.

The injunction restrains PATCO and all F.A.A. employees, until the final determination of these actions, from taking part in any work stoppage, slowdown, etc., or obstructing the orderly continuance of air traffic, provides for a penalty of $250. per man for the first day of any violation of the injunction and $125. per man for any subsequent days, subject to hearings before the penalty is imposed, directs the F.A.A. to restore the defendants who have returned to work to the duties to which they were assigned before the work stoppage, and directs the F.A.A., but only until further order of the court, to withhold any further administrative action in respect of sanctions based upon the alleged work stoppage. The court retains jurisdiction in the premises.

I will sign two copies of this injunction, one to be filed in each case.

Opinion of the United States District Court in *Leyden* v. *Federal Aviation Administration, et al.*

[315 F. Supp. 1398 (E.D.N.Y. 1970)]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 69-C-1566

August 5, 1970

JOHN F. LEYDEN, Individually and on Behalf of all Other Similarly Situated Air Traffic Control Specialists Employed by the Federal Aviation Administration in the Eastern Region,

Plaintiffs,

—v.—

FEDERAL AVIATION ADMINISTRATION and GEORGE M. GARY, as Director, Eastern Region, Federal Aviation Administration,

Defendants.

MEMORANDUM AND ORDER

JUDD, *District Judge.*

In this action for an injunction against alleged improper conduct of disciplinary proceedings by the defendants, a motion was brought on by order to show cause to obtain a preliminary injunction

(a) to prevent defendant George M. Gary from acting as an appeals official in connection with suspensions of the petitioners, and

(b) to prevent the Federal Aviation Administration (F.A.A.) from holding any hearing or inquiry regarding plaintiffs' appeals from disciplinary actions unless seven specific procedural safeguards were afforded, and also for other and further relief.

The action was brought on behalf of plaintiff and other air traffic control specialists employed by F.A.A., who were alleged to be a class. The complaint recited that an F.A.A. official issued fifty or more letters of suspension, ranging from three to fifteen days each, to air traffic controllers working at the New York Air Route Traffic Control Center and the New York Common IFR Room, all charging abuse of sick leave, and that the results of any suspension will become part of the permanent personnel files of each plaintiff. Plaintiffs filed notices appealing their suspensions. Thereafter, defendant Gary appointed ten grievance examiners to conduct informal interviews and transmit findings of fact and recommendations to him as the appeals official. The total loss of pay to plaintiffs from the suspensions is over $10,000.

The complaint recites that the grievance examiners will not permit a verbatim transcript of proceedings before them, will not permit confrontation or cross-examination of witnesses, and may receive evidence from the F.A.A. in the absence of the plaintiffs, and that the final findings will not be available to plaintiffs. Alleging that the decision to suspend the plaintiffs was made by defendant Gary, the complaint asserts that he may not also serve as appeals

official. It asserts that the Regulations of the F.A.A. for appeals, and the restrictive procedures proposed by the grievance examiners, deprive plaintiffs of their constitutional right to due process of law.

In addition to asking for an injunction against defendant Gary acting as appeals official, the complaint asks the protection of the following procedural rules:

(a) Recording and transcription of all proceedings;

(b) Production of all witnesses and evidence in support of charges;

(c) Confrontation and cross-examination of such witnesses;

(d) The right of plaintiff to present oral and documentary evidence;

(e) Placing the burden of proof on F.A.A.;

(f) Making the proposed findings and the record available to plaintiffs before it is submitted to the appeals official; and

(g) The right to question the grievance examiner concerning his qualifications and concerning his prior knowledge of the matter.

In support of the order to show cause, plaintiffs' affidavits recite that plaintiff Leyden was treated for gastritis by his personal physician on the evening of June 19, 1970, and was advised to take medication and rest, that he nevertheless reported at 2:30 a. m. because after he reported his illness his watch supervisor stated that he was extremely short-handed; but that he was thereafter given notice of a three-day suspension for "abuse of sick leave" for reporting

four hours late and for failing to substantiate that he was incapacitated by sickness. An affidavit of counsel describes an interview with one of the grievance examiners, who told him that his decision would be based in part on private interviews with witnesses, and that he had already examined a file prepared by investigators of the security and compliance branch of the F.A.A. Many other air traffic controllers in the metropolitan area had also reported sick and not available for duty on the same evening, and had turned in medical certificates attesting to their illness. Counsel also recites that the Administrator of the Federal Aviation Administration publicly stated to a group of controllers that he himself had directed the filing of the specific charge which was made.

The only answering paper is an affidavit by defendant Gary reciting that unusually large numbers of employees had failed to report for duty on June 19, 1969 at F.A.A. facilities throughout the country, on the ground that they were ill and not able to work, that he had discussed with his staff a plan for appropriate measures to staff facilities where mass absenteeism required, that he discussed the matter with his counterparts at other regional headquarters, that he knew that the Administrator of F.A.A. had ordered a formal investigation concerning the nature, extent and bona fides of the alleged illnesses, and that he had received reports as to the number of interrogations conducted at the New York Center and the Common IFR Room but not of the facts developed by the interrogations. He recited that he considered that his reviewing the investigators' reports or discussing sanctions with facility chiefs or grievance examiners prior to the reports of the grievance examiners would be incompatible with his responsibilities as the appeals official.

The papers show a sufficient number of persons affected, a sufficiently common interest, and a suitable named plaintiff to justify maintaining the action as a class action. F.R.Civ.P. 23.

Defendants' time to answer the complaint was extended by stipulation for sixty days after February 6, 1970, but no answer has yet been filed; nor have any interrogatories or notices of depositions been filed.

All the suspensions but one have been served, but none of the appeals has yet been considered.

Plaintiff asserts that his three day suspension resulted in a loss of compensation of $187. This would indicate that a thirty day suspension might result in a penalty of from $1,200 to $1,800.

F.A.A. Appeals Procedures

The Regulations of the Civil Service Commission provide a specified procedure for suspensions of thirty days or less, 5 C.F.R. Secs. 752.301-304. A different procedure is provided in connection with discharge, suspension for more than thirty days, furlough without pay, and reduction in rank or compensation (5 C.F.R. Secs. 752.201-203) and appeals from such actions (Secs. 771.201-226). The F.A.A. Regulations are modeled on the Civil Service Commission's Regulations for agencies.

In the case of suspensions for thirty days or less the F.A.A. Regulations permit the suspension to take effect immediately (Sec. 203(b) (1)), but provide for an administrative appeal, which gives rise to a "grievance inquiry" by an "impartial grievance examiner" (Secs. 322, 411-13).

The F.A.A. Regulations direct that the grievance examiner must be someone who had no previous connection

with the case, who has received training in conducting grievance inquiries and who is "sufficiently high in the organizational structure to command respect" (Section 413). The grievance examiner is required to familiarize himself with the case through management records and personal interviews with those directly concerned, including either individual or group discussions, as well as from the employee's written request for an inquiry (Sec. 413). The grievance inquiry is to be conducted in "as informal manner as possible consistent with getting the facts." (Sec. 416).

The employee and his representative have the right to make a personal presentation to the grievance examiner (Sec. 416). They may also furnish a list of witnesses they desire, and the examiner will determine which witnesses to hear (Sec. 415(a)). The grievance examiner makes findings of fact and recommendations which he forwards to the appeals official (Sec. 418), who makes a written decision and provides copies for the employee and the official who made the original decision (Sec. 408(e)).

An appeals official, except the Administrator, may not make the final decision on a grievance upon which he made an earlier decision (Sec. 512(b)). The papers reveal a dispute as to whether defendant Gary took part in the decision to suspend any of the plaintiffs. Where an appeals official is ineligible, the regulations (§ 512(b)) provide:

> "Such grievances shall be adjudicated by an appeals official at the next higher administrative level."

The procedure outlined above is consistent with the statutory requirements for removal or suspension of persons in the competitive service (5 U.S.C. § 7501(b)). The statute expressly states:

> "Examination of witnesses, trial or hearing is not required but may be provided in the discretion of the individual directing the removal or suspension without pay."

Instead of appealing and requesting a grievance inquiry, an employee may appeal the initial suspension to the Civil Service Commission, but the F.A.A. will not accept an appeal if the employee has appealed to the Commission (Sec. 323). An appeal to the Civil Service Commission can be based only on the ground that the F.A.A. has not followed correct procedures or that there has been discrimination on account of political reasons, sex, marital status or physical handicap (Sec. 321(d) (2)).

Thus an employee threatened with a suspension of thirty days or less has the choice of an agency procedure without a hearing or a Civil Service Commission procedure that does not reach the merits.

In case of suspensions for more than thirty days there is a different procedure, with a hearing officer appointed to take testimony, prepare a record and submit findings to the appeals official together with the entire appeal record. See Appendix I to F.A.A. Handbook on Adverse Actions, Appeals, and Grievances.

Still different provisions apply to "preference-eligible" employees, but the complaint does not assert that any of the plaintiffs are in that category. 5 U.S.C. § 7512.

One court has stated, with respect to air traffic controllers, that:

> "I do not believe that due process enters into the contract between the United States and its employees." Herriges v. United States, 314 F. Supp. 1352 (D. Mont., July 2, 1970).

While this court does not take so dim a view of a federal employee's rights, it is necessary to examine the restrictions which affect a court's powers.

Jurisdiction

The action cannot be sustained on the basis of federal question jurisdiction, since 28 U.S.C. § 1331(a) requires that more than $10,000 be in controversy, and this amount cannot be made up by consolidating smaller individual claims. *Cf.* Snyder v. Harris, 394 U.S. 332, 89 S.Ct. 1053, 22 L.Ed.2d 319 (1969); Rosado v. Wyman, 414 F.2d 170, 176-177 (2d Cir. 1969), rev'd. on other grounds, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970).

Plaintiffs suggest that jurisdiction may be based on 28 U.S.C. § 1337, relating to actions "arising under any Act of Congress regulating commerce." Whether this section covers the rights of an employee of an agency regulating commerce need not be decided, for there is another basis of jurisdiction, and any obstacles to judicial action would affect section 1337 jurisdiction as well.

Plaintiffs also refer to 28 U.S.C. § 1346 as amended, (the Tucker Act), which gives district courts jurisdiction of contract actions, and would include suits to recover compensation owed to employees of the United States. This section may provide review of final action of the agency, but it is not an appropriate basis for an injunction action prior to any final agency decision.

The Administrative Procedure Act remains as the most appropriate basis of jurisdiction. That Act, in 5 U.S.C. § 702, sets forth that any person adversely affected by action of any federal agency is entitled to judicial review. Daub v. United States, 223 F.Supp. 609 (E.D.N.Y.1963).

In aid of such review, courts may stay administrative action, 5 U.S.C. § 705. Hamlin Testing Laboratories, Inc. v. United States Atomic Energy Comm., 337 F.2d 221 (6th Cir. 1964).

The government finds an obstacle to A.P.A. review in 5 U.S.C. § 554(a) (2), which excludes the application of that section to cases involving "the selection or tenure of an employee." This does not mean that employees are deprived of all judicial review, but only that they are not entitled to the specific procedural rights in the agency which § 554 affords, in adjudications required by statute to be determined on the record. Significantly, § 554 is part of Chapter 5 of Title 5, headed "Administrative Procedure," while § 702 is part of Chapter 7 of Title 5, headed "Judicial Review." Other actions against employees have been reviewed, after the employee was given more protection than defendants are said to offer here. Deviny v. Campbell, 90 U.S.App.D.C. 171, 194 F.2d 876 (1952). The case of Barefield v. Byrd, 320 F.2d 455 (5th Cir. 1963), relied on by defendants, really turned on the specific prohibition of judicial review of decisions concerning veterans' benefits. 38 U.S.C. § 211(a).

The Supreme Court, moreover, has given a narrow construction to a general prohibition against judicial review, and held that it was not intended to deprive courts of power to correct actions that are plainly illegal. Oestereich v. Selective Service System, 393 U.S. 233, 89 S.Ct. 414, 21 L.Ed.2d 402 (1968). *Cf.* Barlow v. Collins, 397 U.S. 159, 90 S.Ct. 832, 837-838, 25 L.Ed.2d 192 (1970).

Moreover, courts will require that agencies live up to their own procedures, and enforce this rule even against the Army. Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968);

Cf. Vitarelli v. Seaton, 359 U.S. 335, 540, 79 S.Ct. 968, 973, 3 L.Ed.2d 1012 (1959). Appointment of an ineligible appeals official would be a violation of F.A.A.'s own procedures.

Even if jurisdiction exists, the defendants assert that it should not be exercised until administrative remedies have been exhausted. However, the doctrine of exhaustion is not a rigid one. Hammond v. Lenfest, supra, 398 F.2d at 714; Reeber v. Rossell, 91 F.Supp. 108 (S.D.N.Y.1950). In a class action to determine the procedure to be followed by the grievance examiners, there is ground for determining basic rules in advance, without waiting for the final decisions and requiring perhaps fifty separate reviews.

On balancing harm from the granting or denial of a preliminary injunction, the scales tip toward the plaintiff's side. Delay in hearing the appeals will not prejudice the defendants, while the plaintiffs have made an adequate showing of harm to them, in prosecuting multiple appeals which may be determined under improper procedure. Plaintiffs also have shown enough possibility of success on some or all the issues to permit granting a preliminary injunction.

Particular Claims Asserted

Plaintiffs' first claim is that they should be afforded a recording or transcription of the proceedings before the grievance examiner. The Court of Claims has upheld the right of a hearing official, in the interest of saving time and money, to decide that a transcript will not be made at government expense, and to substitute a satisfactory summary of the record. Horn v. United States, 177 F.Supp. 438 (1959). Here the plaintiffs are not assured even the right to review a summary of the record.

In another district, air controllers have been denied the right to have their own reporter present to make a transcript. Sparks v. Federal Aviation Agency, 305 F.Supp. 673 (E.D. La. 1969); see also Sparks v. United States, 310 F.Supp. 1261 (E.D.La.1970). The theory of that ruling was that the hearing officer was entitled to maintain as much informality as he saw fit. When a $10,000 penalty is visited on a group of men, it is small comfort to be assured that it was done in an informal manner. The First Amendment to the United States Constitution assures the right "to petition the Government for a redress of grievances." In order to make an effective presentation of their grievances, it may be important for plaintiffs to show exactly what took place in the appeals procedure. No reason but administrative whim has been asserted for denying plaintiffs the right to make their own transcription of the appeal proceedings.

Plaintiffs' next three claims, the right to produce their own evidence, to confront witnesses, and to know the evidence against them, are expressly denied by statute. 5 U.S.C. § 7501(b). The complaint does not expressly challenge the constitutionality of this provision. If it did, it would be necessary to convene a three-judge court to consider the case. 28 U.S.C. § 2282.

Plaintiffs' fifth claim, that the burden of proof should be on F.A.A., has not been directly disputed by defendants. If there is no judicial review, there is no way of telling whether the burden of proof has been sustained, but the issue is not appropriate for decision at this time.

Plaintiffs' sixth claim, that they should see the findings and record before they are submitted to an appeals official, relates to a detail of procedure. At some stage, the evidence used to prove the agency's case must be made available to

the employee. Greene v. McElroy, 360 U.S. 474, 476, 79 S. Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959). If judicial review is available at the end, any deficiency in the evidence or findings may result in upsetting the determinations. The agency takes that risk, but the court will not at this stage direct that tentative findings must be submitted in every case.

Effective administration requires that discipline of employees for minor offenses be not judicialized so far that supervisors will be reluctant to correct infractions. The balance between the constitutional rights of the employee and the needs of prompt discipline must leave some discretion in the employing agency. Where that balance lies in this case cannot be fully determined until defendants have answered the complaint and the issues have been explored.

Plaintiffs' final claim is the right to question the grievance examiners concerning their qualifications and their prior knowledge of the matter. This may be accomplished by depositions in this action, and does not require any injunctive relief.

It is therefore ordered

(1) that this action be maintained as a class action;

(2) that defendant George M. Gary be restrained from acting as an appeals official in respect of any of the plaintiffs until the issues in this action have been determined;

(3) that the defendant Federal Aviation Agency and any grievance examiners acting under its authority be restrained from interfering with the rights of plaintiffs to record and transcribe all proceedings before such grievance examiners, by tape recorder, stenographic or other reasonable means selected by plaintiffs;

(4) that the request for a temporary injunction be denied in all other respects, but without prejudice to plaintiffs' rights to depose the designated grievance examiners;

(5) that defendants' time to answer the complaint be extended until September 15, 1970; and

(6) that the case be set for pretrial conference at 2 p. m. on Thursday, October 8, 1970.

Order of the United States District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

70-C-400

AIR TRANSPORT ASSOCIATION OF AMERICA, *et al.*,

Plaintiffs,

—against—

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION ("PATCO"), *et al.*,

Defendants.

70-C-410

UNITED STATES OF AMERICA,

Plaintiff,

—against—

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION ("PATCO"), *et al.*,

Defendants.

PRELIMINARY INJUNCTION

This matter coming on for further hearing by the court pursuant to the retention of jurisdiction in the "Order for Temporary Injunction and Other Provisions" dated April 13, 1970 and upon the affidavits, orders and memoranda filed subsequent thereto and the arguments of counsel, and upon the papers on file in the case entitled John F. Leyden, et al. v. Federal Aviation Administration, et al., 69-C-1566, and the court having dictated into the record a memorandum of decision;

NOW, THEREFORE, IT IS ORDERED:

I. That the defendant, Professional Air Traffic Controllers Organization ("PATCO"), its officers, agents, servants, employees and the individual defendants named in the full captions (except those against whom either action has been discontinued or severed and those who were not found fit to return to work after examination by the impartial medical board appointed by the court), and any and all employees of the Federal Aviation Administration, whether or not affiliated with "PATCO" and all other persons, in active concert or participation with the defendants, or any of them, be enjoined until the final determination of these actions,

(a) From in any manner continuing, encouraging, ordering, engaging, aiding or taking any part in any strike, work stoppage or slowdown or any interference with or obstruction to the movement or operation of any aircraft in air commerce or air transportation at any traffic facility operated by the Federal Aviation Administration, or interference with or obstruction to

the application of the safety standards or procedures established by the Federal Aviation Administration for the regulation and control of air traffic in the United States of America;

(b) From in any manner interfering with or obstructing the orderly continuance of air traffic in the United States;

(c) From taking any action which would interfere with this court's jurisdiction in the premises; provided however, that nothing in this order shall be construed to require an individual employee to render labor or service without his consent or to make the voluntary quitting of his labor or service by an individual employee, on his own initiative and not in concert an illegal act.

II. That any violation of this order shall be subject to a penalty of at least $250 per man for the first day of any violation and $125 per man for any subsequent days, subject to hearing on the facts of violation and any other relevant circumstances.

III. That the Federal Aviation Administration be and it hereby is directed until further order of this court:

(a) To restore all defendants in the action who have returned to work to the performance of the duties to which they were assigned prior to March 25, 1970, not later than May 14, 1970.

(b) To withhold any further administrative actions in respect of suspensions, removals or any other sanctions based upon the alleged work stoppage between

March 25, 1970 and April 14, 1970, against any employees who are defendants in these actions and subject to the temporary injunction issued by this court.

IV. This court shall retain jurisdiction in the premises.

Dated: Brooklyn, New York
May 5, 1970

/s/ ORRIN G. JUDD
Orrin G. Judd
United States District Judge